IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-...75-1809

ALAN RABINOVITCH,

Appellant,

v.

EWALD B. NYQUIST, *Commissioner of Education of the State of New York, et al.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75- ....

ALAN RABINOVITCH,

Appellant,

v.

EWALD B. NYQUIST, *Commissioner of Education of the State of New York, et al.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Opinions Below

The opinion of the three-judge district court is reprinted in Appendix C, pages 5a-11a. It is reported at 406 F. Supp. 1233 (E.D. & W.D.N.Y. 1976). An earlier memorandum opinion rendered by District Judge Judd is also reprinted in Appendix C, pages 12a-17a. That opinion is not reported.

Jurisdiction

Plaintiff brought this action to challenge the constitutionality of New York Education Law § 661(3) (McKinney's, Supp. 1975-76 at p. 23) and to recover funds unlawfully withheld from him by defendant-appellee New

York State Higher Education Services Corporation ("NYSHESC"). The statute bars all resident aliens who refuse to become naturalized United States citizens as soon as eligible from receiving the benefits of all forms of financial assistance otherwise available to students enrolled in institutions of higher education situated in New York State. Pursuant to said statute plaintiff was denied financial assistance for the 1973-74, 1974-75 and 1975-76 school years. Plaintiff alleged that the statute violates both the equal protection and due process clauses of the Fourteenth Amendment and the Supremacy Clause of the Constitution.

Plaintiff premised jurisdiction on 28 U.S.C. §§ 1331(a), 1343(3) and (4), 2201 and 2202; 42 U.S.C. §§ 1981 and 1983; the Fourteenth Amendment and Article VI of the Constitution (the Supremacy Clause). Plaintiff requested that pursuant to 28 U.S.C. § 2281 a three-judge district court be convened to adjudicate the case. That request was granted. (*See* Appendix C, pp. 13a-16a.)

The judgment of the three-judge court, dated March 26, 1976, was entered by the Clerk of the United States District Court for the Eastern District of New York on March 29, 1976. (Appendix A, pp. 1a-2a.) Plaintiff's notice of appeal from that part of the judgment which denied him the full amount of withheld scholarship and tuition assistance funds for each academic year beginning with the 1973-74 school year was filed with the Clerk of said court on April 14, 1976. (Appendix B, pp. 3a-4a.)

This Court's jurisdiction is based on 28 U.S.C. §§ 1253 and 2281. Plaintiff's complaint challenged the constitutionality of a New York State statute of general state-wide applicability and sought to enjoin its enforcement. The constitutional challenge was substantial, indeed it prevailed. Accordingly, the three-judge court was properly convened so that this Court has jurisdiction of this appeal. *Idlewild Bon Voyage Liquor Corp.* v. *Epstein,* 370 U.S. 713, 715 (1962); *Moody* v. *Flowers,* 387 U.S. 97, 99, 101 (1967); *Lynch* v. *Household Finance Corp.,* 405 U.S. 538, 541 n.5 (1972); *Chapman* v. *Meier,* 420 U.S. 1, 13 (1975).[1]

Statute Involved

Section 661(3) of the New York Education Law provides as follows:

> "Citizenship. An applicant (a) must be a citizen of the United States, or (b) must have made application to become a citizen, or (c) if not qualified for citizenship, must submit a statement affirming intent to apply for United States citizenship as soon as he has the qualifications, and must apply as soon as eligible for citizenship, or (d) must be an individual of a class of refugees paroled by the attorney general of the United States under his parole authority pertaining to the admission of aliens to the United States."

Questions Presented

1. Do federal constitutional principles mandate that a judgment against NYSHESC be treated as if it were entered against the State of New York, thus implicating the defense of sovereign immunity under the Eleventh Amendment?

2. Whether Section 5 of the Fourteenth Amendment generally empowers Congress to enact legislation to enforce the proscriptions contained in Section 1 of the Amendment by means, *inter alia,* of suits for monetary

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[1] This Court has jurisdiction over all of the issues necessarily and properly decided by the three-judge court, including plaintiff's claim for withheld assistance funds. *See Haining* v. *Roberts,* 453 F.2d 1223 (5th Cir. 1971), *cert. denied,* 406 U.S. 948 (1972); *Weiser* v. *White,* 505 F.2d 912, 913 (5th Cir.), *cert. denied,* 421 U.S. 993 (1975).

damages against a state? If not, does Section 5 of the Fourteenth Amendment empower Congress to enact such legislation in order to protect the rights and legal status of resident aliens?

3. Has Congress enacted legislation authorizing resident aliens to sue states for money damages to redress deprivations of their Fourteenth Amendment rights?

4. Whether, of its own force, the Fourteenth Amendment constitutes a limitation on the sovereign immunity bar of the Eleventh Amendment so that, even absent a specific statutory declaration authorizing a money judgment against a state, in a suit brought to enforce Fourteenth Amendment rights, a federal court may enter a judgment awarding money damages against a state where, in its discretion, such relief is necessary and appropriate to fully vindicate the plaintiff's constitutional rights and to deter future violations of the constitutional proscriptions?

Statement of the Case

Plaintiff-appellant, Alan Rabinovitch, is a Canadian citizen lawfully admitted to permanent residence in the United States. He has lived in New York State and New York City since coming to the United States in 1964. He recently completed his junior year in Brooklyn College, a part of the City University of New York, where he is majoring in psychology.

In January 1973 Mr. Rabinovitch took the New York State Regents Qualifying Examinations and was notified in April of that same year that his performance on the test had earned him an academic performance scholarship.[2] In addition, he was informed that tuition assistance program

[2] *See* New York Education Law §§ 605, 670 *et seq.* (McKinney's, Supp. 1975-76).

awards would also be available to him.[3] In May 1973 he was informed that in order to receive a Regents Scholarship and tuition assistance he would have to forthwith apply for American citizenship. He refused and in September 1973 was advised that the offer of a Regents Scholarship and tuition assistance had been withdrawn on the sole ground that, since he did not intend to become a citizen of the United States, then Section 602(2)—since renumbered § 661(3)—of the New York Education Law precluded his receipt of any form of financial assistance from New York State toward the cost of his higher education.

Mr. Rabinovitch brought suit in the United States District Court for the Eastern District of New York challenging the constitutionality of New York Education Law § 661(3) on the grounds that it violated both the Fourteenth Amendment and the Supremacy Clause of the Constitution. He sought the convening of a three-judge district court, 28 U.S.C. §§ 2281 and 2284, which motion was granted.[4]

As a consequence of the enforcement of § 661(3) of the Education Law, Mr. Rabinovitch has been forced to attend a public college and has been deprived of any financial assistance toward the cost of higher education. For the academic years 1973-74, 1974-75 and 1975-76, it is estimated that he has been deprived of between $750 and $3,000.

In addition to seeking declaratory and injunctive relief, Mr. Rabinovitch prayed for a judgment against

[3] *See id.* §§ 604, 667 *et seq.*

[4] In Buffalo, New York, a French national enrolled in graduate studies in the State University brought a similar lawsuit challenging Education Law § 661(3). *Mauclet* v. *Nyquist,* Civ.-75-73 (W.D.N.Y.). By order of Chief Judge Kaufman of the Second Circuit, a single three-judge court was convened to adjudicate both cases.

NYSHESC[5] equal to the amount of withheld scholarship and tuition assistance funds. He argued alternatively that a judgment against NYSHESC would not constitute a judgment against New York State barred by the Eleventh Amendment, or that the Eleventh Amendment does not bar federal courts from ordering the payment of withheld funds in an action brought under the Fourteenth Amendment and federal statutes to redress a deprivation of equal protection of the laws.

The case was submitted to the three-judge court on joint motions for summary judgment. The facts were not in dispute. The court heard argument in July 1975. On February 11, 1976, it handed down a unanimous decision (authored by Chief Judge Curtin of the Western District of New York), holding that § 661(3) of the Education Law was unconstitutional. (*See* Appendix C, pp. 8a-10a; 406 F. Supp. at 1235-36). It subsequently entered its judgment enjoining enforcement of the statute. (On May 28, 1976 defendants filed a notice of appeal to this Court from that aspect of the district court's judgment.) The court dealt with plaintiff's request for a judgment against NYSHESC in the last paragraph of its opinion. It said only:

> "Plaintiff Rabinovitch requests money damages in addition to injunctive relief. While declaratory and injunctive relief is approprite, it is the opinion of this court that Edelman v. Jordan, 415 U.S. 651 (1974), holding that the eleventh amendment barred the courts from ordering state officials to remit benefits wrongfully withheld from eligible welfare applicants, does not allow the award of money damages in this case." (Appendix C, p. 11a; 406 F. Supp. at 1236.)[6]

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[5] *See* New York Education Law §§ 652-655, 680, 686 (McKinney's, Supp. 1975-76).

[6] The question of awarding plaintiff a money judgment in addition to declaratory and injunctive relief was extensively briefed

(*footnote continued on following page*)

In both its opinion and judgment, the district court directed only that defendants "re-qualify plaintiff Rabinovitch as a State regents scholarship recipient, as of the date his complaint was filed." (Appendix C, p. 10a; 406 F. Supp. at 1236.) The court made no provision as to the award of withheld scholarship and assistance funds.[7] Plaintiff appeals to this Court from the denial of such relief.

The Questions Are Substantial

1. One of the constitutional questions tendered by this appeal, namely whether Congress is generally empowered by Section 5 of the Fourteenth Amendment to enact legislation authorizing suits for money judgments against the states, has already been recognized as substantial by this

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(*footnote continued from preceding page*)

and argued in the court below. Indeed, plaintiff's counsel devoted 58 pages of a 112 page brief to that subject, and specifically dealt with the decision in *Fitzpatrick* v. *Bitzer*, 519 F.2d 559 (2d Cir.), *cert. granted*, 96 Sup. Ct. 561, 46 L. Ed.2d 404 (1975). Counsel also advised the district court of this Court's grant of a writ of certiorari in the *Fitzpatrick* case.

[7] It is unclear from its opinion as to what the district court intended when it ordered defendants to "re-qualify" plaintiff as a Regents scholar as of August 1974 (when the original complaint was filed). There is no reference in the opinion to awarding plaintiff withheld funds for the 1974-75 and 1975-76 school years. Indeed, the judgment specifically provides that "the plaintiff Rabinovitch is not entitled to money damages." (Appendix A, p. 2a.) One interpretation of that result is, therefore, that plaintiff is not entitled to funds for any period of time prior to the entry of the judgment. An alternative reading is that plaintiff is entitled to the funds withheld for the 1974-75 and 1975-76 academic years, but not for the 1973-74 academic year which terminated prior to the filing of the complaint. If it proves necessary, plaintiff will seek clarification from the district court of this aspect of its opinion and judgment. However, since under either interpretation plaintiff will be deprived of a certain quantum of the withheld funds (either three years' worth or one year's), this open question has no impact on the issues tendered by this appeal.

Court. That issue was tendered in *Fitzpatrick* v. *Bitzer*, No. 75-251, which was argued on April 20-21, 1976. 44 U.S.L.W. 3606. Appellant herein submitted an *amicus curiae* brief in support of petitioners therein.

Presumably, *Fitzpatrick* will be decided during June 1976. If the Court reverses the decision of the Second Circuit declaring the back pay provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(g), unconstitutional as applied to the states in their capacities as employers, the second of the four questions presented herein will have been resolved in appellant's favor. On the other hand, if the Court should affirm in *Fitzpatrick*, the second part of that question will probably remain an open issue. Whether Congress was empowered by Section 5 of the Fourteenth Amendment to enact legislation authorizing damage suits against states by resident aliens seeking to vindicate their Fourteenth Amendment rights involves questions under the Eleventh and Fourteenth Amendments different from and not subsumed within those directly tendered by *Fitzpatrick*.

Since federal power in the area of regulating the immigration and legal status of aliens is supreme and exclusive,[8] the states have been, from the moment of the ratification of the Constitution, wholly without sovereign power which could have been subject to protection via the Eleventh Amendment. The states clearly waived sovereignty as to the regulation of the legal status of immigrants by adopting the Constitution. While the Eleventh Amendment closed the federal courts to ordinary

[8] The power to regulate the immigration and naturalization of aliens is vested exclusively in the federal government. *Fong Yue Ting* v. *United States*, 149 U.S. 698, 713 (1893); *Truax* v. *Raich*, 239 U.S. 33, 42 (1915); *Hines* v. *Davidowitz*, 312 U.S. 52, 62 (1941); *Takahashi* v. *Fish & Game Commission*, 334 U.S. 410, 419 (1948); *Graham* v. *Richardson*, 403 U.S. 365, 377-78 (1971); U.S. Const. Art. I, § 8, cl. 4. State laws which constitute an encroachment on that power cannot stand. *Id.*

suits by aliens against states, upon the adoption of the Fourteenth Amendment, 28 U.S.C. §§ 1343(3) and (4) and 42 U.S.C. §§ 1981 and 1983, the judicial power of the United States was revived as to claims by aliens against states growing out of state action denying equal protection and equal treatment under law with citizens. This conclusion follows from the fact that the states had no sovereign power to regulate the legal status of aliens after 1789, and the jurisdictional bar of the Eleventh Amendment to suits by an alien against a state was lifted by the Fourteenth Amendment in the particular area of its concern.

It would be particularly inappropriate, even ironic, for states to defeat the claim of aliens such as Rabinovitch for back scholarship funds by asserting the ban of the Eleventh Amendment in a case dealing with a subject over which they have lacked sovereign power for 187 years. Such a result would pervert the purpose and intention of the Eleventh Amendment.

Whatever the result in *Fitzpatrick*, therefore, the issues tendered by this case, as applied to the special situation of resident aliens, will remain significant and will require resolution by this Court.

2. In *Fitzpatrick* the congressional authorization of a damage remedy against the states was explicit. While we do not have a statutory declaration as specific as Section 706(g) of Title VII in this case, there is nonetheless congressional authorization for the damage remedy.

Congress has enacted a comprehensive plan for the regulation of immigration and naturalization and has specifically legislated as to the legal status of aliens vis-a-vis the laws of the several states. By the provisions of 42 U.S.C. § 1981 Congress has granted to aliens the full and equal benefit of all laws:

> "All persons within the jurisdiction of the United States shall have the same right in every State and

> Territory . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citiezns."

This statute applies to aliens as well as citizens. *Takahashi* v. *Fish & Game Commission, supra,* 334 U.S. at 419 n. 7; *Graham* v. *Richardson, supra,* 403 U.S. at 377; *Guerra* v. *Manchester Terminal Corporation,* 498 F.2d 641, 654 (5th Cir. 1974). Accordingly, this Court has held that "aliens lawfully within this country have a right to enter and abide in any State in the Union 'on an equality of legal privileges with all citizens, under non-discriminatory laws.' *Takahashi,* 334 U.S. at 420." *Graham* v. *Richardson, supra,* 403 U.S. at 378.

When Congress enacted Section 1981 pursuant to its plenary power to regulate the status of aliens and in order to specifically protect Fourteenth Amendment rights, *see Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409, 436 (1968), it necessarily implied a remedy for violations thereof. Plainly compensatory damages is such a remedy. *See* 28 U.S.C. §§ 1343(3) and (4). While the foregoing jurisdictional provisions do not themselves create a damage remedy, they indicate that Congress anticipated such awards would be made under the civil rights acts generally. Further, courts have "the power to afford all remedies necessary to the vindication of federal substantive rights defined in statutory and constitutional provisions except where Congress has explicitly indicated that such remedy is not available." *Brewer* v. *Hoxie School District No. 46,* 238 F.2d 91, 98 (8th Cir. 1956); *Bell* v. *Hood,* 327 U.S. 678, 684 (1945); *see also Texas & N.O.R. Co.* v. *Ry. Clerks,* 281 U.S. 548, 569-570 (1929). In essence, the existence of the statutory right implies the existence of all necessary remedies. *Texas & N.O.R. Co.* v. *Ry. Clerks, supra.*

In *Sullivan* v. *Little Hunting Park, Inc.,* 396 U.S. 229 (1969), in the context of a suit against a private defendant,

the Court specifically considered the question of whether federal courts may award compensatory damages to redress a violation of Section 1982 (the companion provision to Section 1981). The Court held that damages were available in an action under Section 1982 because the "existence of a statutory right implies the existence of all necessary and appropriate remedies." *Id.* at 239.

This appeal accordingly tenders for decision the question whether in cases involving Fourteenth Amendment rights, specifically the legal status of aliens, the absence of a statute *specifically authorizing* an award of damages against a state bars such relief, *see Edelman* v. *Jordan,* 415 U.S. 651 (1974); *Employees* v. *Department of Public Health and Welfare,* 411 U.S. 279 (1973); or whether, even absent such a specific statutory provision, it is nonetheless clear that Congress intended that the states be subject to damage awards in cases such as this. *See Parden* v. *Terminal R.R. of Alabama Docks Dept.,* 377 U.S. 184 (1964). The question is substantial and warrants plenary consideration by this Court.

3. Also of significance is the question whether a claim to vindicate the right to equal protection of the laws under the Fourteenth Amendment (without reference to any particular statutory declaration of available remedies) is sufficient to warrant the imposition by a court of a judgment for damages against a state. While the decision in *Fitzpatrick* may well have a marked impact on this issue, we submit it is today an open question.

We take as our guide the decisions in *Bell* v. *Hood, supra,* and *Bivens* v. *Six Unknown Narcotics Agents,* 403 U.S. 388 (1971). In *Bell* this Court held that "where federally protected rights [specifically including constitutional rights] have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." 327 U.S. at

684. In *Bivens* the Court specifically held that a violation by a federal agent of the Fourth Amendment "gives rise to a cause of action for damages consequent upon his unconstitutional conduct." 403 U.S. at 389.

The Court in *Bivens* was met by the objection that the Fourth Amendment "does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation," *id.* at 396, but, relying on *Bell,* it held that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Id.,* quoting from 327 U.S. at 684. The Court went on to note that, absent "affirmative action by Congress" to preclude the award of damages for the violation of a constitutional right, the federal courts should not "hesitate" to award such judgments. *Id.*[9]

In our case even though the Fourteenth Amendment does not in so many words provide for its enforcement by suits for money damages, there are the general federal jurisdictional provisions of 28 U.S.C. §§ 1331(a) and 1343(3) and (4) which authorize such a suit. No act of Congress enacted subsequent to the Fourteenth Amendment's limitation of the ban of the Eleventh Amendment dictates that such a suit for damages to redress a violation of the Fourteenth Amendment does not lie against a state. Therefore we submit that the federal courts should be free to award the traditional remedy of damages against states

[9] *Bivens* has been followed and applied in a variety of constitutional contexts. *See, e.g., Apton* v. *Wilson,* 506 F.2d 83, 93 (D.C. Cir. 1974); *Moore* v. *Koelzer,* 457 F.2d 892 (3d Cir. 1972); *Butler* v. *United States,* 365 F. Supp. 1035 (D. Hawaii 1973) (Fifth Amendment); *Howard* v. *Warden,* 348 F. Supp. 1204 (E.D. Va. 1972), *app. dismissed,* 474 F.2d 1341 (4th Cir. 1973) (First and/or Ninth Amendments); *Vonder Ahe* v. *Howland,* 508 F.2d 364 (9th Cir. 1975) (Fourth Amendment).

in equal protection cases where, as here, such relief is essential to redress the injury suffered and to deter future violations of the Amendment.

4. Appellant argued below that a judgment against NYSHESC was not barred by the Eleventh Amendment, regardless of the outcome in *Fitzpatrick,* because such a judgment should not be regarded for federal constitutional purposes as having been rendered against New York State. The district court did not see fit to comment in its opinion on this question. The issue is nonetheless significant. It has been considered in a number of recent cases, and will presumably loom large in the future if *Fitzpatrick* is affirmed. Even if *Fitzpatrick* is reversed, the issue will remain significant because the Eleventh Amendment will continue as a bar to a wide variety of suits against states. As such, it is important that this Court speak to the issue of when a state-created entity ceases to enjoy the protection of the Eleventh Amendment.

NYSHESC is an educational corporation created by New York law to administer all New York State financial aid and load programs for higher education. New York Education Law § 652(1) and (2) (McKinney's, Supp. 1975-76). All of its corporate powers are held by a nine member board of trustees. *Id.* § 652(3). While the corporation clearly receives the bulk of its money from appropriations made by New York State, once received such funds, and all other funds received,[10] are held by the board of trustees. *Id.* § 653(1). The corporation may sue and be sued in its own name. *Id.* § 653(4). The corporation's existence is unlimited, save for the power of the legislature to legislate it out of existence. *Id.* § 68. Of particular importance, the board is also authorized:

> "To take, hold and administer, on behalf of the corporation and for any of its purpose, real property,

[10] Some funds come from the federal government and others are derived from private sources. *See id.* § 656.

> personal property and moneys, or any interest therein, and the income therefrom, either absolutely or in trust, for any purposes of the corporation. The board may acquire property or moneys for such purpose by purchase or lease . . . and by the acceptance of gifts, grants, bequests, devises or loans; provided, however, that *no obligation of the corporation shall be a debt of the state.*" *Id.* § 653(8). (Emphasis supplied.)

See also id. §§ 660 and 686.

While defendants have never indicated the amount of money that was withheld from plaintiff, it seems clear that the range as of June 1976 is between $750 and $3,000. *Id.* §§ 667 and 670. There is no question but that NYSHESC can meet such a judgment from its own funds without having to seek any additional monies from New York State.

The fact that NYSHESC is a creature of state law which performs functions which may be termed governmental should not control.

> "The mere fact that a particular agency or instrumentality was created by the state legislature and performs certain governmental functions is not dispositive of this issue." *Bowen* v. *Hackett,* 387 F. Supp. 1212, 1220 (D.R.I. 1975).

Rather, the cases have indicated that a variety of factors should be considered in determining if a particular agency or instrumentality is the "alter ego" of the state for Eleventh Amendment purposes. *See Bowen* v. *Hackett, supra* at 1221 and n. 12; *Gordenstein* v. *University of Delaware,* 381 F. Supp. 718, 720-721 (D. Del. 1974). Included are whether the entity is separately incorporated; the degree of autonomy over its own operations; whether it can sue or be sued and enter into binding contracts; and whether the state is immune from honoring its obligations. NYSHESC is a separate corporation; it is autonomous

within its sphere of responsibility; it can enter into contracts and can sue or be sued in its own name; and it alone is responsible for its obligations.

While none of the various factors which the cases have isolated has been found conclusive, "the most important is whether payment of a judgment will have to be made out of the state treasury, i.e., whether the fund in question has both the independent power and resources to pay the judgment without further action by the state legislature or other governmental officer or entity." *Bowen* v. *Hackett, supra* at 1221. In this case a judgment against NYSHESC will be the debt of that corporation alone and there will be no call upon the state treasury. In addition, the payment of the small amount of money here involved can easily be made by the corporation from its present resources without the need for seeking additional appropriations.

In addition to *Bowen* and *Gordenstein,* a number of other recent cases have concluded that the government agencies involved did not enjoy Eleventh Amendment immunity. *See Hutchinson* v. *Lake Oswego School Dist.,* 519 F.2d 961, 966-67 (9th Cir. 1975);[11] *Morris* v. *Board of Education of Laurel School Dist.,* 401 F. Supp. 188, 203-05 (D. Del. 1975); *King* v. *Ceasar Rodney School Dist.,* 396 F. Supp. 423, 425-27 (D. Del. 1975). *But compare George R. Whitten, Jr., Inc.* v. *State University Construction Fund,* 493 F.2d 177 (1st Cir. 1974); *Simkin & Sons, Inc.* v. *State University Construction Fund,* 352 F. Supp. 177 (S.D. N.Y.), *aff'd without opinion,* 486 F.2d 1393 (2d Cir. 1973). In *Fitzpatrick* the Second Circuit concluded that the Connecticut State Employment Retirement System ("SERS")

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[11] Two petitions for certiorari have been filed in *Hutchinson,* No. 75-568, 44 U.S.L.W. 3285, and No. 75-1049, 44 U.S.L.W. 3446. From the summary available in Law Week it does not appear that either presents the question raised herein.

did enjoy the state's Eleventh Amendment immunity. 519 F.2d at 565.[12]

The issue is current; it is significant. It too warrants plenary treatment by this Court.

Conclusion

For the foregoing reasons, this Court should note probable jurisdiction of this appeal and after full consideration of the merits should reverse the judgment below denying appellant an award against NYSHESC compensating him for all withheld financial assistance.

June 11, 1976.

Respectfully submitted,

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[12] That determination was not brought to this Court for review by petitioners in *Fitzpatrick*. The Second Circuit analyzed the facts of that case in accordance with the criteria set forth in *Bowen* and *Gordenstein* and concluded that as a consequence of any judgment against SERS a significant burden would be imposed on the state treasury. That court also held that SERS "had none of the indicia of independence from the state, such as separate incorporation or a power to sue in its own name." 519 F.2d at 565. Accordingly, the court could not conclude that a judgment against SERS was not within the contemplation of the Eleventh Amendment. Application of the criteria sanction in *Fizpatrick* to the facts of our case leads to a contrary result.

Appendix A, Judgment.

FILED
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U. S. DISTRICT COURT E.D. N.Y.
MAR 29 1976

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civ-75-73

JEAN-MARIE MAUCLET,

Plaintiff,

—VS—

EWALD B. NYQUIST, et al.,

Defendants.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

74 Civ 1142

ALAN RABINOVITCH,

Plaintiff,

—VS—

EWALD B. NYQUIST, et al.,

Defendants.

This action came on for trial before a three judge court, the Honorable Ellsworth A. Van Graafeiland, United States Circuit Judge, the Honorable Orrin G. Judd, United

Appendix A, Judgment.

States District Judge, and the Honorable John T. Curtin, United States District Judge, presiding, and a memorandum and order of the court having been filed on February 17, 1976, that New York Education Law § 661(3) is unconstitutional and that defendants are enjoined from its enforcement and directing the defendants to process plaintiff Mauclet's 1974-1975 tuition assistance application that was pending when he started this suit, and to re-qualify plaintiff Rabinovitch as a State regents scholarship recipient, as of the date his complaint was filed, and denying money damages to plaintiff Rabinovitch,

ORDERED and ADJUDGED that New York Education Law § 661(3) is unconstitutional and the defendants are enjoined from its enforcement, and that the defendants process plaintiff Mauclet's 1974-1975 tuition assistance application that was pending when he started this suit, and re-qualify plaintiff Rabinovitch as a State regents scholarship recipient, as of the date his complaint was filed and that the plaintiff Rabinovitch is not entitled to money damages.

Dated: Brooklyn, New York
March 26, 1976

LEWIS ORGEL
Clerk

ELLSWORTH VAN GRAAFEILAND
U.S.C.J.

JOHN T. CURTIN
U.S.D.J.

ORRIN G. JUDD
U.S.D.J.

Appendix B, Notice of Appeal.

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.
APRIL 14, 1976

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

74 Civ. 1142 (OGJ)

ALAN RABINOVITCH,

Plaintiff-Appellant,

—against—

EWALD B. NYQUIST, et al.,

Defendants-Appellees.

PLEASE TAKE NOTICE that plaintiff, Alan Rabinovitch, hereby appeals from that part of the judgment herein dated March 26, 1976 and filed in the office of the Clerk of this Court on March 29, 1976, which denies plaintiff's demand for a money judgment against defendant New York State Higher Education Services Corporation for the full amount of withheld scholarship and tuition assistance funds to which plaintiff was entitled for each of the academic years beginning with the 1973-74 school year.

Appendix B, Notice of Appeal.

The appeal is taken pursuant to 28 U.S.C. §§ 1253 and 2281.

Dated: New York, New York
April 12, 1976

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Appendix C, Decision and Order.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civ-75-73

JEAN-MARIE MAUCLET,
Plaintiff

—vs—

EWALD B. NYQUIST, Commissioner of Education of the State of New York, and NEW YORK STATE HIGHER EDUCATION SERVICES CORPORATION,
Defendants

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

74 Civ. 1142

ALAN RABINOVITCH,
Plaintiff

—vs—

EWALD B. NYQUIST, Commissioner of Education of the State of New York, THE UNIVERSITY OF THE STATE OF NEW YORK, THE BOARD OF REGENTS OF THE STATE OF NEW YORK, THE NEW YORK STATE HIGHER EDUCATION SERVICES CORPORATION and the NINE INDIVIDUAL MEMBERS OF THE BOARD OF TRUSTEES OF SAID CORPORATION, namely DOES I through VI and *ex officio* EWALD B. NYQUIST, ERNEST L. BOYER and ROBERT J. KIBBEE and the PRESIDENT OF SAID CORPORATION (the unnamed individuals being unknown to plaintiff),
Defendants

Before VAN GRAAFEILAND, Circuit Judge, JUDD, District Judge for the Eastern District of New York, and CURTIN, Chief Judge, Western District of New York.

CURTIN, Chief Judge:

Mauclet v. *Nyquist* was instituted by a resident alien in the Western District of New York; *Rabinovitch* v. *Nyquist* was brought by a resident alien in the Eastern District of New York. In both cases, New York Education Law § 661(3) (McKinney's Supp. 1975),[1] which requires an applicant for New York State financial aid[2] to be a United States citizen or intend to become a citizen, was challenged as unconstitutional. The cases were consolidated and heard by a three-judge court pursuant to 28 U.S.C. §§ 2281, 2284. The facts as set out below are not in dispute.[3]

Plaintiff Jean-Marie Mauclet, a resident of New York State since April 1969, is a graduate student at the State

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[1] § 661(3), former § 602(2), provides, in pertinent part, as follows:

> Citizenship. An applicant (a) must be a citizen of the United States, or (b) must have made application to become a citizen, or (c) if not qualified for citizenship, must submit a statement affirming intent to apply for United States citizenship as soon as he has the qualifications, and must apply as soon as eligible for citizenship.
> (McKinney's Supp. 1975.)

[2] There are three general forms of student financial assistance: (1) General Awards, which include tuition assistance; (2) Academic Performance Awards, including regents scholarships; and (3) Student loans and loan guarantees. N.Y. Educ. Law §§ 667-680 (McKinney's Supp. 1975).

[3] Both plaintiffs motioned to amend their complaints to include the New York State Higher Education Services Corporation, an educational corporation formed in 1975, which coordinates the New York State financial aid programs. N.Y. Educ. Law § 652 (McKinney's Supp. 1975). The motions were granted orally at the three-judge court.

University of New York at Buffalo. He is a French citizen, married to an American citizen and father of an American citizen. He submitted an application for a tuition assistance award for the academic year 1974-1975 and satisfies all requirements for the award except citizenship.

Plaintiff Alan Rabinovitch, a Canadian citizen, has been a resident of New York State since 1964. In January 1973, Mr. Rabinovitch took the competitive Regents Qualifying Examination, and thereafter was informed by defendants University of the State of New York and the Board of Regents that he was qualified to receive a regents scholarship. Subsequently, Mr. Rabinovitch was informed that the offer of scholarship was withdrawn solely because he did not intend to become a citizen, as required by § 661(3).

Both plaintiffs seek a judgment declaring § 661(3) invalid, enjoining its enforcement and requiring defendants to process the plaintiffs' applications for assistance. In addition, plaintiff Rabinovitch requests damages for past monies withheld by defendants. Both plaintiffs ask for attorney fees and costs.

Plaintiffs contend that § 661(3) denies to resident aliens the equal protection of the laws guaranteed by the fourteenth amendment, and conflicts with the comprehensive and preemptive congressional scheme regulating the entry and residence of aliens in the United States.

We must first resolve the preliminary question of standing. Clearly, plaintiffs have standing to contest the statute as it applies to the scholarship and tuition assistance award programs. However, defendants claim that plaintiffs do not have standing to challenge § 661(3) with respect to the student loan aspect of the program. Rabinovitch never applied for a student loan and Mauclet received one in the past, before he announced his intention not to become a United States citizen. At oral argument,

the State admitted that had Rabinovitch applied for a student loan, and refused to make the required statement of intention to become a United States citizen, his application would have been refused. But the State apparently feels that the actual denial of an application is necessary to give plaintiffs standing to contest the constitutionality of § 661(3) as regards student loans. We do not agree.

Nothing would be gained by adjudicating the statute as it applies to all but one aspect of the assistance program. Both plaintiffs allege injuries from this statute. Both would be further injured were they to apply for student loans. We feel that this is a proper case in which to apply the expended concept of standing and allow these plaintiffs to assert the rights of those aliens who are injured by this statute with regard to loans. *Eisenstadt* v. *Baird,* 405 U.S. 438, 443-446 (1972); *Barrows* v. *Jackson,* 346 U.S. 249 (1953).

In *Graham* v. *Richardson,* 403 U.S. 365 (1971), the Supreme Court declared:

> [C]lassifications based on alienage, like those based on nationality or race, are *inherently suspect and subject to close judicial scrutiny.* Aliens as a class are a prime example of a "discrete and insular" minority . . . for whom such heightened judicial solicitude is appropriate. 403 U.S. at 372. (Footnotes and citations omitted, emphasis added.)

The defendants maintain that the classification involved here is not based on alienage per se because only those aliens who do not wish to become citizens are denied assistance. The defendants emphasize that the applications of many resident aliens have been granted after these individuals either applied for United States citizenship or signed a statement agreeing to do so as soon as they were eligible. This argument defies logic. Those aliens who

apply, or agree to apply when eligible, for citizenship are relinquishing their alien status. Because some aliens agree under the statute's coercion to change their status does not alter the fact that the classification is based solely on alienage.

Next the defendants argue that since education is not a fundamental or basic constitutional right, *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973), the standard of strict judicial scrutiny is inapplicable. But it is long settled that where a suspect classification is involved, strict scrutiny is to be invoked whether or not the right involved is fundamental. *Graham* v. *Richardson, supra,* at 375-376.

In the case *In Re Griffiths,* 413 U.S. 717 (1973), in which a Connecticut rule excluding aliens from admission to the practice of law was struck down, the Supreme Court was explicit as to the burden a state must bear to justify the use of a suspect classification:

> The Court has consistently emphasized that a State which adopts a suspect classification "bears a heavy burden of justification," *McLaughlin* v. *Florida,* 379 U.S. 184, 196 (1964), a burden which, though variously formulated, requires the State to meet certain standards of proof. In order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is "necessary . . . to the accomplishment" of its purpose or the safeguarding of its interest. 413 U.S. at 721-722 (footnotes omitted).

Defendants have failed to meet this burden. First they argue that the various forms of assistance are gratuities that can be distributed according to the sovereign's will.

But the Supreme Court "has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" *Graham* v. *Richardson, supra,* at 374. Next the State asserts that its interest in an educated electorate, fully able to participate in community political life, and the plaintiffs' refusal to accept the responsibilities of citizenship, are sufficient reasons for it to limit assistance to citizens and future citizens. For this proposition, the State cites *Spatt* v. *New York,* 361 F.Supp. 1048, *aff'd* 414 U.S. 1058 (1973), in which the State's requirement that its assistance could only be used at colleges and universities within New York State was upheld. It is doubtful that defendants' explanation would survive even the rational relationship test applied in *Spatt.*[4] Although resident aliens may not vote, they pay taxes, register with the Selective Service, and "contribute in myriad other ways to our society." *In Re Griffiths, supra,* at 722. In any case, the State has not demonstrated a compelling interest justifying its discriminatory classification. § 661(3) is therefore unconstitutional and defendants are enjoined from its enforcement. Defendants are directed to process plaintiff Mauclet's 1974-1975 tuition assistance application that was pending when he started this suit, and to re-qualify plaintiff Rabinovitch as a State regents scholarship recipient, as of the date his complaint was filed.

Having ruled on plaintiffs' fourteenth amendment claim, there is no need to reach plaintiffs' argument that § 661(3)

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[4] The court in *Spatt* found no fundamental right or suspect classification invoking strict scrutiny, and therefore analyzed the State's interests under the rational relationship test. The court found that the State had a valid interest in encouraging gifted students to attend New York schools, in building a strong system of colleges within the State and in attempting to achieve an equalization of school financing costs between in-state and out-of-state students. None of the above mentioned interests are served by excluding qualified, tax-paying resident aliens.

is unconstitutional because it encroaches on the exclusive federal power over aliens.

Plaintiff Rabinovitch requests money damages in addition to injunctive relief. While declaratory and injunctive relief is appropriate, it is the opinion of this court that *Edelman* v. *Jordan,* 415 U.S. 651 (1974), holding that the eleventh amendment barred the courts from ordering state officials to remit benefits wrongfully withheld from eligible welfare applicants, does not allow the award of money damages in this case.

So ordered.

ELLSWORTH A. VAN GRAAFEILAND
Ellsworth A. Van Graafeiland
United States Circuit Judge

ORRIN G. JUDD
Orrin G. Judd
United States District Judge
Eastern District of New York

JOHN T. CURTIN
John T. Curtin
United States District Judge
Western District of New York

Dated: February 11, 1976.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

74-C-1142

ALAN RABINOVITCH, on behalf of himself and on behalf of all others similarly situated, etc.,

Plaintiffs,

against

EWALD B. NYQUIST, *et al.*,

Defendants.

Dated: May 23, 1975

JUDD, J.

MEMORANDUM AND ORDER

Plaintiffs have moved for the convening of a three-judge court and for certification of the case as a class action.

Facts

The complaint seeks injunctive relief against Section 602(2) of the New York Education Law. Plaintiff's attack is based on the claim that he was disqualified for a New York State Regents Scholarship, although he won a competitive test, because he is an alien who does not intend to apply for American citizenship. Plaintiff has been lawfully admitted to permanent residence within the United States and has resided in New York since 1964.

The claim for class action certification is based on the assertion that plaintiff knows five individuals who have been denied educational assistance funds because of their

status as aliens and that the census figures indicate that there may be as many as 200,000 resident aliens who might seek the benefit of the statutes under attack.

Discussion

1. Jurisdiction of the action exists under 28 U.S.C. § 1343(3), without the necessity of establishing the jurisdictional amount of $10,000. *Hagans* v. *Lavine,* 415 U.S. 528, 535-36, 94 S.Ct. 1372, 1380 (1974).

2. In determining the necessity for a three-judge court, the issue is whether plaintiff's claim is "wholly insubstantial," *Bailey* v. *Patterson,* 369 U.S. 31, 33, 82 S.Ct. 594, 551 (1962), or whether "its unsoundness so obviously results from previous decisions of [the Supreme Court] as to foreclose the subject." *Ex parte Poresky,* 290 U.S. 30, 32, 54 S.Ct. 3, 4 (1933). See also *Goosby* v. *Osser,* 409 U.S. 512, 518, 93 S.Ct. 854, 858 (1973); *Rosenthal* v. *Board of Education,* 497 F.2d 726 (2d Cir. 1974).

The United States Supreme Court has recently held that alienage is not a valid reason for states to deny various benefits to persons.

In *Graham* v. *Richardson,* 403 U.S. 365, 91 S.Ct. 1848 (1971), the court struck down state statutes barring non-citizens or, in one case, those who had not been residents for fifteen years, from categorical assistance. It held that "classifications based on alienage, like those based on nationality, or race, are inherently suspect and subject to close judicial scrutiny." 403 U.S. at 372, 91 S.Ct. at 1852. It expressly rejected the argument that the "special public interest," i.e., the "State's desire to preserve limited welfare benefits for its own citizens," justified restricting benefits to citizens and longtime residents. The court also suggested that such state statutes conflict with

the "complete scheme of regulation" governing the qualifications for entry and status of immigrants which the federal government has enacted pursuant to its constitutional authority. 403 U.S. at 378, 91 S.Ct. at 1855.

In *Sugarman* v. *Dougall,* 413 U.S. 634, 93 S.Ct. 2844 (1973), the court voided a New York law barring non-citizens from permanent competitive positions in the state civil service, even though the "record does not disclose that any of the four appellees ever took any steps to attain United States citizenship." 413 U.S. at 638, 93 S.Ct. at 2845. Though the holding rested somewhat on the fact that the classification was both over and underinclusive with regard to the purported state purpose of limiting government service to those fully aware of American mores, the court cited *Graham* and basically decided that the state had failed to advance a forceful reason for employing a suspect classification. 413 U.S. at 642-46, 93 S.Ct. at 2848-49. It noted the various obligations of membership in the political community which resident aliens fulfill, and replied to the argument that resident aliens are more likely to leave the state at some time by quoting the lower court's view that the state would be "hard pressed to demonstrate that a permanent resident alien who has resided in New York or the surrounding area for a number of years . . . would be a poorer risk for a career position in New York . . . than an American citizen." 413 U.S. at 645, 93 S.Ct. at 2849, quoting 339 F. Supp. 906, 909.

In *In re Griffiths,* 413 U.S. 717, 93 S.Ct. 2851 (1973), the court invalidated a Connecticut statute which disqualified even permanent resident aliens from membership in the bar. It said that "Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society. It is appropriate that a State bear a heavy burden when it deprives them of employment opportunities." 413 U.S.

at 722, 93 S.Ct. at 2855. The court found that the state had not proffered any persuasive justification.

The Supreme Court now has before it three cases bearing on the issues in this case. In *Mow Sun Wong* v. *Hampton,* 500 F. 2d 1031 (9th Cir. 1974), *cert. granted,* 94 S.Ct. 3067, the lower court voided as violative of due process a regulation of the United States Civil Service Commission barring non-citizens from competitive positions. In *Weinberger* v. *Diaz,* 361 F. Supp. 1 (S.D. Fla. 1973) (three-judge court), *prob. juris. noted,* 94 S.Ct. 2381 (1974), the lower court invalidated the exclusion of aliens who have not been continuous residents for five years from a supplemental medical insurance plan enacted as part of Medicare. And in *Ramos* v. *United States Civil Service Commission,* 376 F. Supp. 361 (D. P.R. 1974) (three-judge court), appeal filed August 30, 1974, No. 74-216), the lower court held, after *Sugarman,* that the federal government could not exclude resident aliens from civil service employment or from eligibility for federal disaster relief loans.

The New York statute in question here was sustained by a state court in *Friedler* v. *University of New York,* 70 Misc.2d 444, 333 N.Y.S.2d 928 (Sup. Ct. Erie Co. 1972). This decision predated all the Supreme Court cases outlined above, except for *Graham,* which was not cited. It does not oblige this court to view plaintiffs' claim as "wholly insubstantial."

The issue in the case at bar was not decided in *Spatt* v. *New York,* 361 F. Supp. 1048 (E.D.N.Y. 1973), *aff'd,* 94 S.Ct. 563 (1973), which merely upheld the requirement that Regents Scholarships be used at institutions within New York State. That case did not involve alienage, was decided on the "rational basis" test, and depended on specific purposes advanced by the state in support of the particular law.

No United States Supreme Court case has decided the effect of alienage on the right to public grants for higher education. In light of the Supreme Court cases outlined above, the basic issue in this case may be whether there is something about Regents Scholarships which sufficiently differentiates them from licensure in a profession, or eligibility for civil service employment, or public assistance, so that a state's discrimination against aliens would be permissible. It may be that scholarships are less vital to existence than a job or welfare grants, or it may be that the state can cite some compelling purpose which the classification advances. But the Supreme Court cases cited above, far from foreclosing a challenge to this statute, provide an array of philosophical and practical arguments militating against the constitutionality of this type of classification. It is therefore necessary to request the convening of a three-judge court, pursuant to 28 U.S.C. § 2281.

Plaintiffs' proposed amendment of the complaint to refer to the modified New York statute (L. 1974, c. 942) will not affect the conclusion in this memorandum.

3. The motion for class action status is based on the assertion that the class is a large one, but gives little attention to the requirement of F.R.Civ.P. 23(b)(3) that the court find that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Apart from the fact that four students in the Buffalo area have brought actions attacking the statute within the last three years, the only evidence of the size of the class is based on estimates from census figures.

Certifying the matter as a class action requires some identification of the members of the class and provision for notice at the expense of plaintiffs. *Eisen* v. *Carlyle*, 417 U.S. 156, 94 S.Ct. 2140 (1974). Class action procedure

is therefore a cumbersome method, which is not particularly helpful where the issue is one of the constitutionality of a statute. Any decision of the legal issues in this case will have *stare decisis* effect, even more so if this case is consolidated with the case pending before Judge Curtin in the Western District of New York. *Mauclet* v. *Nyquist*, Civ. 75-73. The plaintiff in this case will not graduate until mid-1977. It is probable that the case will be decided on the merits before then. In this case no real necessity has been shown for treating the case as a class action.

It is ORDERED that the motion for the designation of a three-judge court be granted. The court will notify the Chief Judge of the Circuit.

It is further ORDERED that the motion for class action status be denied.

ORRIN G. JUDD
U. S. D. J.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1809

ALAN RABINOVITCH,

Appellant,

v.

EWALD B. NYQUIST, *Commissioner of Education of the State of New York, et al.,*

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

Appellees move pursuant to Rule 16 of the Rules of this Court for dismissal of the appeal from that part of the judgment of the United States District Courts for the Western and Eastern Districts of New York, dated March 26, 1976, denying appellant retroactive damages equal to the amount of state financial aid he alleges he would have received but for this enforcement of New York Education Law § 661(3) and, in the alternative, for an affirmance of that part of the March 26 judgment.

This Motion to Dismiss or Affirm is submitted with a Jurisdictional Statement in *Nyquist* v. *Mauclet,* Doc. No.

, wherein the same public officials and agencies appeal from the March 26 judgment insofar as it declares New York Education Law ("NYEL") 661(3) invalid under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and permanenly enjoins its enforcement. The Statement of the Case at pp. 4-7 of the Jurisdictional Statement in *Mauclet* v. *Nyquist* is incorporated by reference.

Appellant's claim for retroactive damages is foreclosed by prior decisions of this Court.

"'[W]hen the action is in essence one for recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit . . ." *Edelman* v. *Jordan,* 415 U.S. 651, 663 (1974), quoting *Ford Motor Co.* v. *Department of Treasury,* 323 U.S. 459, 464 (1945). The state's Eleventh Amendment sovereign immunity does not bar injunctive relief against a public official which requires him to conform his conduct to the Fourteenth Amendment, *Ex parte Young,* 209 U.S. 123 (1908), or the "ancillary effect" on the public treasury that such prospective compliance may have. *Edelman* v. *Jordan, supra* at 667-668. It does not bar monetary awards when the state consents to be sued on such claims or otherwise waives its immunity, *Edelman* v. *Jordan, supra* at 673-677, or when Congress, acting within its delegated powers, has abrogated the state's immunity through specific legislation. *Fitzpatrick* v. *Bitzer,* —— U.S. ——, 44 U.S.L.W. 5120, 5121-5123 (June 28, 1976).

Appellant's claim for damages falls squarely within the first stated rule barring such awards and not within any of the enumerated exceptions. The damages sought are monies appellant alleges he would have received from state tuition assistance and a Regents Scholarship for the academic years 1973-1974 and 1974-1975 (Amended Complaint, Prayer for Relief ¶ 5), all of which accrued prior to the entry of the judgment in March of 1976.* As such, they are identical with the damages sought by the welfare recipients in *Edelman* and held barred, i.e. "an accrued monetary liability which must be met from the general revenues of a State" (Id. at 664) which arose at a time when appellees were "under no court-imposed obligation to conform to a different standard" (Id. at 668-669).

Appellant's several efforts to distinguish his case from *Edelman* are without merit. A state is not *without sovereign immunity* in a suit challenging a statute regulating the distribution of public benefits simply because some of the classifying factors adopted by the statute relate to alienage. See Jurisdictional Statement, pp. 8-9. While appellant is correct in stating that federal power over immigration and naturalization is exclusive, this power has never been held to foreclose states from using alienage as a classifying criterion, *De Canas* v. *Bica,* —— U.S. ——, 44 U.S.L.W. 4235 (February 25, 1976); *Hines* v. *Davidowitz,* 312 U.S. 52 (1941), particularly with respect to the distribution of public benefits. *Examining Board of Engineers, Architects and Surveyors* v. *De Otero,* —— U.S. ——, 44 U.S.L.W. 4890, 4900 (June 15, 1976); *Graham* v. *Richardson,* 403 U.S. 365, 372 (1971); *Crane* v. *New York,* 239 U.S. 195 (1915); *Heim* v. *McCall,* 239 U.S. 175 (1915). Nor, of course, did New York consent to suits by aliens for damages or waive its sovereign immunity by adopting the Constitution. Jurisdictional Statement, p. 8. Waiver will only be found " 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construc-

* In his Jurisdictional Statement, p. 5, appellant also claims damages for the 1975-1976 academic year of which only three months remained after the entry of the judgment. Appellant is of course entitled to have appellees conform with the judgment for this three month period and provide him with aid assuming he is otherwise qualified.

tion.' " *Edelman* v. *Jordan, supra* at 673, quoting *Murray* v. *Wilson Distilling Co.,* 213 U.S. 151, 171 (1909). This Court has refused to find implied or constructive consent to suits where Eleventh Amendment immunity was involved. *Edelman* v. *Jordan, supra* at 673-674.

Appellant's further argument that Congressional intent to abrogate the states' sovereign immunity is expressed or implied by the early Civil Rights Acts, particularly 42 U.S.C. § 1981, has already been rejected. See Jurisdictional Statement, pp. 9-13. This statute and 42 U.S.C. § 1983 with their jurisdictional counterpart, 28 U.S. § 1343(3) and (4), have served as the basis for the very federal actions in which the Eleventh Amndment has been held to bar the relief requested herein, e.g., *Edelman* v. *Jordan, supra; Rothstein* v. *Wyman,* 467 F.2d 226 (2d Cir. 1972) cert. den. 411 U.S. 921 (1973). Substantially the same argument made by appellant with respect to § 1981 as authorizing damage awards was presented by the *Edelman* respondents with respect to § 1983 and rejected by a majority of the Court. *Edelman* v. *Jordan, supra* at 679-681. This majority view was recently reaffirmed in *Bitzer* v. *Fitzpatrick, supra* at 5122, when the Court distinguished *Edelman* from the Title VII claim for damages there involved on the ground that the *Edelman* claim was not supported by the "threshold fact of congressional authorization" that supported the Title VII claim. See also *Runyon* v. *McCrary,* 44 U.S.L.W. 5034, 5041-5042 (June 25, 1976).

Appellant's concluding argument that the New York State Higher Education Services Corporation is not a state agency for Eleventh Amendment purposes and thus without sovereign immunity is equally without merit. As noted above, the state is the real party in interest when the monetary award must be met from "general revenues." *Edelman* v. *Jordan, supra,* at 664, 665. NYSHESC receives the bulk of its money from state tax levies (Jurisdictional Statement, p. 13) and, as a result, any award against NYSHESC "must inevitably come from general revenues" of the state. *Edelman* v. *Jordan, supra* at 666.

CONCLUSION

For the foregoing reasons, the appeal from that part judgment of the District Court, dated March 26, 1976, denying appellant damages should be dismissed or, alternatively, that portion of judgment should be affirmed.

Dated: New York, New York, August 12, 1976.

Respectfully submitted,

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